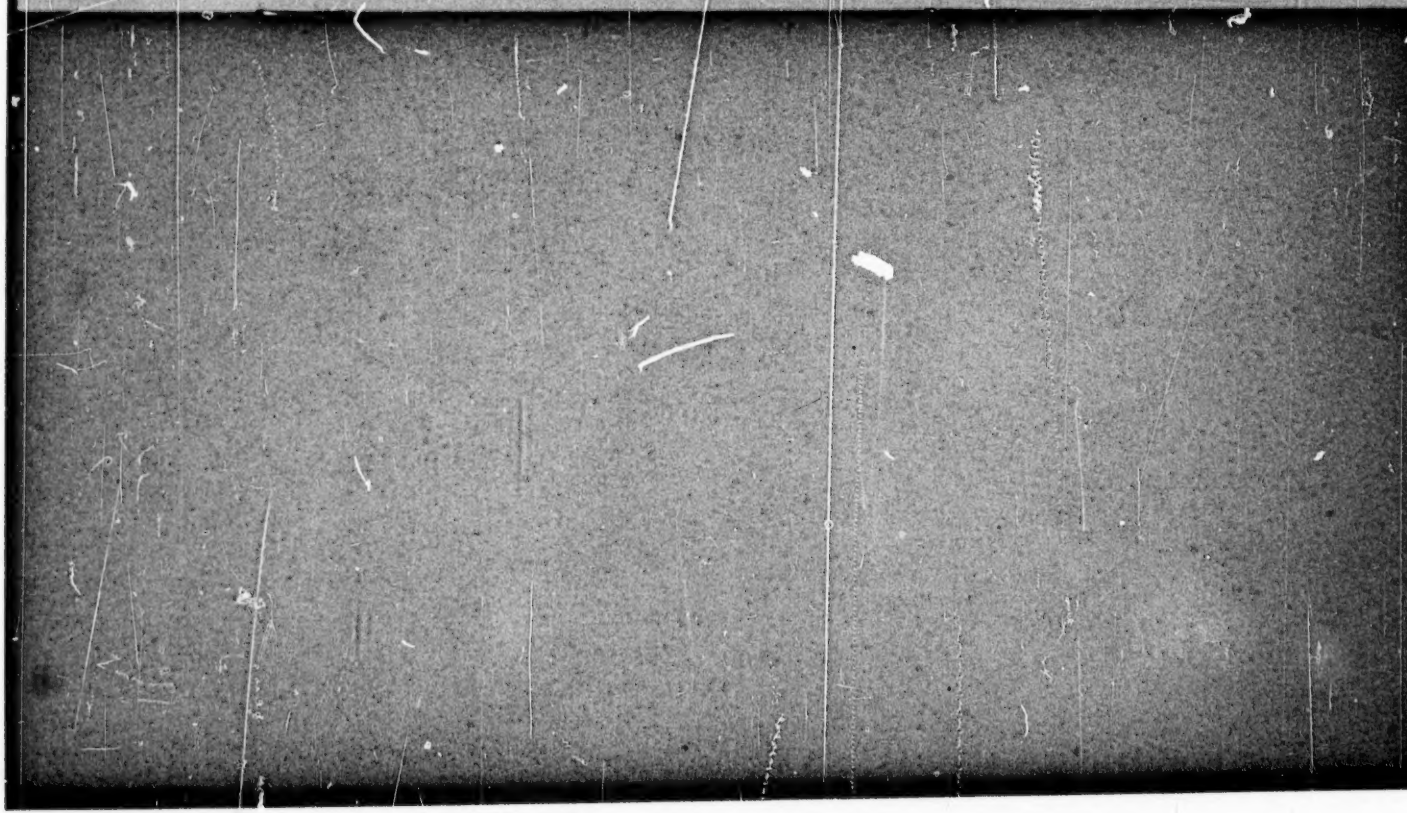

IN THE

Supreme Court of the United States

NOV 8 1974
MICHAEL RODAK, JR.

October Term, 1973
No. 73-1387

In re the Marriage of
JAMES E. FITHIAN, JR.,
Petitioner,

and

CAMILLE J. FITHIAN,
Respondent.

PETITION FOR REHEARING.

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By Denying Petitioner's Writ of Certiorari the Court Is in Direct Conflict With Its Decision in United States v. Tyler, 105 U.S. 244.

As indicated in the original Petition for Writ of Certiorari, the applicable rule in California is that active duty military pay, as with any pay received for employment, is not subject to distribution in a *dissolution proceeding*. (California Civil Code, Section 5119.)

Petitioner contends that Federal military retirement pay is active duty pay at a reduced rate, thus not within the jurisdiction of the California Courts in a dissolution proceeding. This contention is supported by the United States Supreme Court case of *United States v. Tyler*, 105 U.S. 244.

The issue presented in *Tyler*, is the same as that in the present petition: Whether money received by a military officer by way of military retirement is a form of active duty pay.

The Court held that retired officers continued to be a part of the military forces of this country. The *Tyler* case states:

> "The provisions of the statutes, and the uniform treatment of these officers, conform to this view, and necessarily imply that, while not required to perform full service, they are a part of the army, and may be assigned to such duty as the laws and regulations permit."

The Court went on to state:

> "It is impossible to hold that men who are by statute declared to be a part of the army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules, and who may finally be dismissed on such trial from the service in disgrace, are still not in the military service.
>
> If Congress chose to provide for their qualified relief from active duty, and for a diminished compensation, it did not discharge them from their other obligations as part of the army of the United States."

It concluded:

> "We are of opinion that retired officers are in the military service of the government . . ."

In denying Petitioner's Writ of Certiorari, the Court has placed itself in direct opposition to its holding in

United States v. Tyler, supra, without actually overruling it.

Petitioner contends Federal military pay is not subject to characterization by the California Court as compensation solely for past services. By denying Certiorari, the Court is allowing the California Supreme Court to make Federal military pay as compensation for past services, a Federal question, inconsistent with the decision in *Tyler.* It is, therefore, respectfully submitted that the Court hear the present petition and either affirm or overrule its holding in *United States v. Tyler, supra.*

Conclusion.

For the foregoing reasons a Petition for Rehearing should issue to review the opinion of the Supreme Court of California in this action.

STEVEN E. BRIGGS,
Attorney for Petitioner.

LAWTON, CHRISTENSEN, FAZIO, MCDONNELL,
BRIGGS, WARD & DESALES,
Of Counsel.

I, Steven E. Briggs, attorney for Petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for purpose of delay.

STEVEN E. BRIGGS,

Attorney for Petitioner.